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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959

No. [illegible]

MEMPHIS A. F. L.-C. I. O. LABOR COUNCIL, et al.,
Petitioners,

vs.

CITY OF MEMPHIS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

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vs.

CITY OF MEMPHIS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Memphis A. F. L.-C. I. O. Labor Council, consisting of more than 100 thousand electric consumers, with other individual electric rate payers and consumers, pray writ of certiorari issue to the Court of Appeals and Supreme Court of Tennessee to review judgment entered herein June 6, 1960, depriving them and other electric consumers by arbitrary illegal rates of more than $3 million, and affecting the marketing of the Tennessee Valley Authority and other public electric power of the United States.

CITATIONS TO OPINIONS BELOW.

These illegal electric rates were arbitrarily fixed by the City Commission of the City of Memphis by order, printed in Appendix, page 49. The Chancellor issued a temporary injunction (Appendix, pages 21 and 22); but the appellate court held the Chancellor was without jurisdiction to review these rates although allegedly illegal, unfair, exhorbitant, excessive, discriminatory, confiscatory, arbitrary, unreasonable, fraudulent, unconstitutional and void (Appendix, pages 23 to 27).

Judgments, orders, opinions and decrees of Courts and administrative agencies herein are not reported but are appended to this petition.

JURISDICTION.

The judgment of the Supreme Court of Tennessee was entered on June 6, 1960 (Appendix, p. 28 and R. 131).

Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257 (3), since this involves titles, rights, privileges and immunities specially set up and claimed by these petitioners under the Constitution of the United States, Fifth and Fourteenth (Section 1) Amendments, granting them freedom and immunity from this violation of due process and arbitrary deprivation of their property by these illegal and confiscatory rates.

Jurisdiction is also invoked under Rule 19 (1a) of this Court, since the state decision that such rates are not subject to judicial review is not in accord with applicable decisions of this Court.

QUESTION PRESENTED.

Do the Courts have jurisdiction to review electric utility rates to determine whether rates meet constitutional requirements, to declare rates unconstitutional and void to prevent a City, owning and operating an electric utility, with authority delegated to it by the legislature to fix reasonable rates, from attempting to use such authority arbitrarily to fix unfair, exhorbitant rates violating the Fifth and Fourteenth (Section 1) Amendments to the Constitution of the United States?

CONSTITUTION AND STATUTE INVOLVED.

The Fifth and Fourteenth Amendments to the Constitution of the United States are printed in the Appendix, page 11. Tennessee Private Acts 1939, Chapter 381, Section 7, giving the City authority to fix rates, is printed in the Appendix, page 12.

STATEMENT OF THE CASE.

After more than 20 years solely as a retail municipal distributor of Tennessee Valley Authority power, the City of Memphis completed its own municipally owned generating facilities in 1959. But the City currently still has a contract with TVA to purchase cheap TVA power to be resold after 1959 at the greatly increased Memphis rates here in question.

Experts employed by the City "estimated" the City would require 20 percent increase from $30 million to $36 million in utility revenue in 1960 for such novel, unauthorized and arbitrary purposes as "to maintain sound financial condition", pay millions into the City treasury for general municipal purposes as "a tax equivalent", and accumulate cash through excessive depreciа-

tion sufficient to begin construction of "a fourth generating unit" (Appendix, pages 13-14), converting the city owned utility into a source of substantial city revenue, contrary to statute and constitutions.

Ignoring 1959 profits of $5 million and $55 million accumulated cash (R. 26-28, 56-60), the utility unexpectedly proposed, and the City hastily approved the requested increase (Appendix, page 16), rejecting petitioners' requests for suspension of the rates to permit fair and adequate hearing and investigation (R. 1, 3). Then having prejudged it, partisan purported "hearings" were held on eves of Christmas, New Year and City administration changes (R. 3-6). The City produced no evidence, only "estimates", speculation and conjecture, both contradictory and erroneous (R. 62).

Rates filed on December 21, 1959, approved on December 29, 1959, went into effect the same day, and have since been collected without bond (Appendix, page 19).

Petitioners, representing many thousand small consumers, filed suit in Chancery Court January 4, 1960, to have the illegal rates declared unconstitutional and void in violation of constitutions and statute and the Fifth and Fourteenth (Section 1) Amendments to the Constitution of the United States (R. 9-21). Petitioners also seek a refund of the unlawful 20 percent increase being collected, which currently (July, 1960) approximates $3 million and is increasing at the rate of about $500 thousand per month.

The Chancellor granted an injunction, modified January 8, 1960 (Appendix, pages 21, 22). The utility failing to answer, a pro confesso judgment was taken in Chancery Court February 4, 1960 (R. 35).

February 25, 1960, the utility presented its petition for certiorari to the Tennessee Court of Appeals alleging the Chancellor was without jurisdiction, that the City

Commission in fixing rates was acting in a proprietary and not a governmental capacity, and its action fixing rates was final and conclusive and not subject to judicial review.

February 26, 1960, the Court of Appeals granted the utility's petition, dissolved the injunction and dismissed the bill, holding the Chancellor was "without jurisdiction to grant the relief prayed" (Appendix, page 27). Timely petition for review presented to the Tennessee Supreme Court was denied without written opinion June 6, 1960 (Appendix, page 28).

The record presents a question of law involving the jurisdiction of the Courts over rates of municipally owned and operated utilities, since in the record all material facts are uncontroverted.

THE FEDERAL QUESTION RAISED.

The federal question was raised at the pleading stage by the following language:

> "19. Petitioners would further show that they are home owners and consumers of electric power distributed by the respondent Memphis Light, Gas and Water Division, and as such are required monthly to pay electric rates imposed by Memphis Light, Gas and Water Division and the City of Memphis, and as such, all of the above illegal acts imposing illegal, discriminatory, arbitrary and confiscatory rates, have the effect of depriving them of their property without due process of law, and contrary to the laws of the State of Tennessee, and the Constitutions of the State of Tennessee and of the United States, namely the Fifth and Fourteenth (Sec. 1) Amendments to the Constitution of the United States and Article 1, Section 8, of the Constitution of the State of Ten-

nessee, and that all of the above action of the respondents is illegal, arbitrary, discriminatory and has the effect of depriving petitioners of their vested legal rights by constructive fraud."

Original Petition, R. 18-19.

The federal question was raised in the Supreme Court of Tennessee by assignments of error 1 and 7:

"1. The Court of Appeals erred because it ignored and did not hold that there was no evidence to sustain said electric rate increase. The Court should have, therefore, held that said increase was arbitrary, capricious, unconstitutional and void, and violated due process, Article 1, Sections 8 and 21 of the Constitution of the State of Tennessee and the Fifth and Fourteenth (Section 1) Amendments to the Constitution of the United States (R. 88).

"7. The Court of Appeals erred in not holding that the Chancellor has the right to review the rates for electric power service in the City of Memphis to determine if they meet the requirements of the Constitution of the State of Tennessee, Article 1, Sections 8 and 21, and the Constitution of the United States, Fifth and Fourteenth (Section 1) Amendments" (R. 89).

The only way for the Tennessee appellate courts to decide this case against these petitioners was to ignore petitioners' constitutional rights. In spite of the fact that the federal constitutional question was repeatedly and strongly raised and presented, it was so ignored.

We invite this Court to inspect the state decrees appended hereto in their entirety to discover one reference to the constitution, or even use of the word, or citation to authority or testimony. The state courts achieved their result in this case only by avoiding and pretermitting all the substantial questions of law and fact presented.

REASONS FOR GRANTING THE WRIT

1. This writ should be granted for the reason that it is difficult to conceive of circumstances more replete in blatant disregard of constitutional rights. This individual freedom from the exercise of arbitrary power, expressed in due process of law in the Fifth and Fourteenth Amendments, has no meaning unless enforced in such cases at the state and local level.

Clearly the city's power to fix rates for its own municipal utility is not a power arbitrary and absolute. Yet clearly, in this case, the city so claims and has arbitrarily established rates without evidence whatsoever to support them, claims these rates absolutely final and conclusive and not subject to judicial review, denies these petitioners a fair hearing, and denies all governmental restraints or obligations, claiming the unrestrained caprice of a proprietor, not subject even to the obligations of a public utility privately owned.

2. This writ should be granted because a settlement of this question by this Court is plainly in the public interest.

In this case the City of Memphis is using its municipally owned utility to produce profit, cash and municipal revenue. It is important in the administration of all municipally owned public power systems to establish that they cannot be arbitrarily so prostituted. **Tennessee Code Annotated**, Section 6-4303. Public and private power are subject to restraints.

This question is important not only to the 175,000 customers and 600,000 population served by the Memphis municipally owned electric system, with $250 million plant investment, due to receive rate refunds of more than $3 million and relief from paying millions in further in-

creases, this question is important also to the millions served throughout the United States by municipally owned or publicly owned power. It is important to municipalities throughout the United States seeking new sources of municipal revenue. It is important to the Tennessee Valley Authority which retails to small consumers all of its power in Tennessee through publicly owned distributors created by the legislature and subject to the courts of Tennessee. It is important to the government of the United States, the Congress and taxpayers of the United States, because of the billions of federal funds invested in Tennessee in hydro-electric and steam electric power generation. Surely this Court will take this opportunity to make it clear that state or local authorities have no power, arbitrary or otherwise, to divert this great investment to their own or other uses. **Tennessee Electric Power Company v. Tennessee Valley Authority**, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543. A new pattern may develop unless the high principles of public power are now reiterated.

3. This writ should be granted for the reason that the Tennessee decisions in this case involve federal constitutional questions of substance not in accord with applicable decisions of this Court.

City council rate making is governmental. **City of Seymour v. Texas Electric Service Co.**, 66 F. (2d) 814, 817, certiorari denied 290 U. S. 685, 54 S. Ct. 121, 78 L. Ed. 590. Proprietary, says Tennessee. **Bybees Branch Water Association v. Town of McMinnville**, 333 S. W. 2d 815, opinion by Chief Justice Prewitt of Tennessee Supreme Court, March 11, 1960, rehearing denied April 6, 1960.

Contrary to Tennessee, this Court in applicable decisions holds that rate making, however done, is subject to judicial review to determine if constitutional requirements

have been met. **St. Joseph Stock Yards Co. v. United States**, 298 U. S. 38, 56 S. Ct. 720, 725, 80 L. Ed. 1033; **Springfield Gas and Electric Co. v. Springfield**, 257 U. S. 66, 42 S. Ct. 24, 66 L. Ed. 131; **Missouri Pacific Railway Co. v. Tucker**, 230 U. S. 340, 349, 33 S. Ct. 961, 57 L. Ed. 1507; **Knoxville Gas Co. v. City of Knoxville**, 261 Fed. 283, 287.

Having paid 4.4705 percent interest on $163 million utility bonds, the City of Memphis decided to finance future construction from cash without issuing further municipal bonds and at the same time put rates high enough to add to municipal revenues. Ignoring 1959 profits of $5 million and $55 million accumulated cash (R. 57), one city expert estimated 1960 loss of $6 million. Another city expert estimated 1960 profit of $4,262,368 (R. 62).

The city's own figures, all "estimates," improperly included $2,843,000 municipal revenue ("in lieu of taxes"), at least $3,707,000 improper depreciation, $1,380,000 unnecessary debt reserve, and $694,000 unnecessary interdepartmental payments, totalling $8,624,000 improperly charged against revenues (R. 62).

All of this being no more than an "estimate," forecast, speculation and conjecture, in so far as it was considered evidence by the Tennessee Supreme Court, was contrary to the decisions of this Court in the **Minnesota Rate Cases**, 230 U. S. 352, 452, 33 S. Ct. 729, 57 L. Ed. 1511, and **Los Angeles Gas Co. v. Railroad Commission**, 289 U. S. 287, 307, 317, 53 S. Ct. 637, 77 L. Ed. 1180.

4. With the increase and growth of public power, plus the large direct participation by the United States in power production, resold through municipalities, it is essential to have a current review and holding by this Court that rates fixed by a municipality are subject to the same restraints, review and constitutional requirements as rates

fixed by any other rate fixing or rate regulating body. Rates fixed for publicly owned utilities are subject to review by the courts to the same extent as rates fixed for utilities privately owned.

CONCLUSION.

For all the foregoing reasons, to protect not only these consumers, but consumers and purchasers of private and public power, everywhere, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The Constitution.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH (SECTION 1) AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B.

The Statute.

TENNESSEE PRIVATE ACTS OF 1939, CHAPTER 381.

"Section 7. Be It Further Enacted, That said Board of Light, Gas and Water Commissioners shall have authority to make a schedule of rates for the several services and for different classes of consumers; and shall make such rates for the service rendered as will enable them at all times to pay operating expenses, interest, sinking funds, reserves for working capital, renewals and replacements, casualties and other fixed charges; but the rates charged users or consumers outside of the City of Memphis shall not necessarily be as low as the rates within the City. The said Light, Gas and Water Commissioners shall have the right to change the schedule of rates for both light, gas and or water in the City and outside the City, from time to time, as in their judgment may be necessary or proper; provided, that before any change shall be made in rates, the Board of Light, Gas and Water Commissioners shall be required to present an application to the Board of Commissioners of the City of Memphis, setting forth the reason for said proposed changes in rates, and said changes in rates shall not become effective until they shall have been approved by said Board of Commissioners, and provided further, that the Board of Light, Gas and Water Commissioners and the Board of Commissioners of the City of Memphis, shall prescribe rates that will be sufficient to pay all bonds or other indebtedness and interest thereon, including reserves therefor, and to provide for all expenses of operation and maintenance of said plants or systems, including reserves therefor."

APPENDIX C

MINUTES OF BOARD OF LIGHT, GAS & WATER COMMISSIONERS, CITY OF MEMPHIS, NOVEMBER 27, 1959:

The Annual Survey and Report of the Electric Utility System of the Memphis Light, Gas & Water Division, made by Burns and Roe, Inc., in their capacity as Consulting Engineers employed by the Division pursuant to the requirements of the Bond Resolution adopted November 27, 1956, by the Board of Commissioners of the City of Memphis, recommends that a formal study of the Division's electric rate structure be undertaken.

In conformance with this recommendation, the President, under authority granted by the Board, employed Black and Veatch, a Consultant Engineering firm of outstanding qualifications, to make a thorough study of the Division's present electric rate structure and make recommendations to the Board of such changes as may be needed. The action of the President conforms to a suggestion made at a later date by the Honorable Edmund Orgill, Mayor of the City of Memphis, in letter addressed to the President dated September 2, 1959, that an outside rate expert be employed to make such study.

A preliminary report submitted by Black and Veatch dated November 24, 1959, shows that in order for the Division to meet all the requirements of the Bond Resolution, to pay principal and interest on interdivisional notes, to pay a tax equivalent to the City of Memphis, and to amortize debt discount and expense, it will require that the Division's electric operating revenue be increased by approximately 20% for the year 1960 and subsequent years.

The Division is faced with the necessity of immediately starting preparations for the installation of the 4th Unit at the Generating Station, the need for said 4th Unit being stressed by the Consulting Engineers, Burns and Roe, Inc., in their Annual Survey and Report. As the time required to place a 4th Unit in operation is at least three years, it is necessary to proceed immediately in order that the unit may be placed in operation at least by May, 1963.

The preliminary report of Black and Veatch is based on certain estimated electric operating revenues and estimated electric operating expenses as determined by them. The Division's forces independently made a similar study. The results of the study by Black and Veatch and the Division's forces are approximately the same.

The following resolution was offered by President Morton, seconded by Commissioner Lewis, and on being put to a vote was unanimously adopted:

Whereas, As outlined in the foregoing preamble, the Division is required to increase its electric operating revenue by approximately 20%, and;

Whereas, It is the duty of the Board of Light, Gas & Water Commissioners to recommend to the Board of Commissioners of the City of Memphis that said Board of Commissioners of the City of Memphis authorize the Division to prepare new rate schedules which will increase the Division's electric operating revenue by approximately 20%.

Now, Therefore, Be It Resolved by the Board of Light, Gas & Water Commissioners, acting for the Memphis Light, Gas & Water Division:

Section 1. The Board of Light, Gas & Water Commissioners, from information submitted to it, is of the unanimous opinion that the electric operating revenue of the Memphis Light, Gas & Water Division must be increased by approximately 20%.

Section 2. The Board of Commissioners of the City of Memphis is hereby requested to authorize the Memphis Light, Gas & Water Division to prepare new rate schedules to effect an increase in the Division's electric operating revenue by approximately 20%; with the understanding that after said new rate schedules are formulated, they will be presented to the Board of Commissioners of the City of Memphis for their formal approval.

Section 3. That the President and the Secretary are hereby authorized and requested to send a certified copy of this resolution to the Board of Commissioners of the City of Memphis for its consideration.

APPENDIX D.

MINUTES OF CITY COMMISSION OF THE CITY OF MEMPHIS, DECEMBER 1, 1959:

Be it resolved by the Mayor and Board of Commissioners of the City of Memphis that the resolution adopted by the Memphis Light, Gas and Water Division at its meeting held November 27, 1959, declaring the necessity for revising the electric rate schedules to increase the electric operating revenue of the Division by approximately twenty per cent, be and it is hereby approved.

Be it further resolved that the Board of Light, Gas and Water Commissioners be authorized to prepare new rate schedule to effect an increase in the Division's electric operating revenue by approximately twenty per cent and present said schedules with their recommendations to this Commission at an early date.

APPENDIX E.

MINUTES OF BOARD OF LIGHT, GAS & WATER COMMISSIONERS, CITY OF MEMPHIS, DECEMBER 17, 1959:

The following resolution was offered by President Morton, seconded by Commissioner Lewis, and on being put to a vote was unanimously carried:

Whereas, The Board of Light, Gas & Water Commissioners, from preliminary information in its possession at the time, adopted a resolution at meeting held November 27, 1959, requesting the Board of Commissioners of the City of Memphis to authorize the Memphis Light, Gas & Water Division to prepare new rate schedules to effect an increase in the Division's electric operating revenue by approximately 20%, the preliminary information indicating that said increase of 20% was needed; and,

Whereas, The Board of Commissioners of the City of Memphis, in resolution adopted December 1, 1959, authorized the Board of Light, Gas & Water Commissioners to prepare new rate schedules and present said schedules with the Division's recommendations to the Board of Commissioners of the City of Memphis for its consideration at an early date; and,

Whereas, The results of the completed study of the Division's Rate Consultants, Black and Veatch (now in process of being printed), indicate to the Board that an increase in the Division's electric operating revenues of approximately 18.5% will be sufficient to meet all the requirements of the Bond Resolution and keep the Division in sound financial condition.

Now, Therefore, Be It Resolved by the Board of Light, Gas & Water Commissioners, subject to the approval of the Board of Commissioners of the City of Memphis, that:

Section 1. All-electric rate schedules now in effect be and the same are hereby rescinded, and effective with all-meter readings on and after December 29, 1959, the following rate schedules, identified as E-1 through E-12, copies of which are attached hereto, are hereby approved and adopted.

Section 2. The President is hereby authorized and requested to have prepared and submit, at the earliest opportunity, to the Board of Commissioners of the City of Memphis for its consideration, Application for Approval of Changes in Electric Rates and respectfully requesting that the Board of Commissioners of the City of Memphis adopt a resolution approving and prescribing the schedules of rates and charges attached hereto and authorizing said schedules of rates to become effective with respect to all meter readings on and after December 29, 1959.

Section 3. The President be and he is hereby authorized and requested to send copy of this resolution, certified by the Secretary, together with Application for Approval of Changes in Electric Rates, to the Board of Commissioners of the City of Memphis for its consideration.

APPENDIX F.

MINUTES OF CITY COMMISSION OF THE CITY OF MEMPHIS, DECEMBER 29, 1959:

Whereas, the Board of Light, Gas & Water Commissioners, acting for the Memphis Light, Gas & Water Division, by resolution adopted December 17, 1959 rescinded all electric rates in effect as of December 29, 1959, and approved and adopted, subject to the approval of the Board of Commissioners of the City of Memphis, new electric rates identified as E-1 through E-12; and

Whereas, acting under authority of said Resolution of December 17, 1959, the president of the Memphis Light, Gas & Water Division had prepared and submitted to the Board of Commissioners of the City of Memphis on December 21, 1959 for its consideration an Application for Approval of Changes in Electric Rates; and

Whereas, said Application for Approval of Changes in Electric Rates included as exhibits thereto, among other exhibits, the schedules of electric rates identified as E-1 through E-12, the Resolution of the Board of Light, Gas & Water Commissioners adopted December 17, 1959, and the final report of Black and Veatch, nationally known experts in the field of utility rates, of its independent study and investigation of the Division's rate structures; and

Whereas, the Board of Commissioners of the City of Memphis, by public notice published in the daily newspapers on December 11, 1959, provided for and held a public hearing on December 22nd, 23rd and 29th, 1959, for the purpose of considering reasons, testimony, statements, studies and exhibits introduced both for and against such proposed increase in electric rates; and

Whereas, from the reasons, testimony, statements, studies and exhibits presented in said public hearing, the Board of Commissioners of the City of Memphis has found and determined that the increases proposed by the Memphis Light, Gas & Water Division are necessary in order that said Division and the City of Memphis perform their obligations under Chapter 381 of the Private Acts of 1939 and the Bond Resolution adopted by the Board of Commissioners of the City of Memphis on November 27, 1956, and to maintain the Division's sound financial condition;

Now, Therefore, Be It Resolved by the Board of Commissioners of the City of Memphis, Tennessee, that it does hereby approve the Application for Approval of Changes in Electric Rates submitted by the Memphis Light, Gas & Water Division, and does hereby approve, adopt and prescribe electric schedules E-1 through E-12, identified as Exhibit "A" to said Application for Approval of Changes in Electric Rates, thereby approving the action of the Board of Light, Gas & Water Commissioners as shown in Section 1 of resolution adopted by the Board of Light, Gas & Water Commissioners on December 17, 1959.

Be It Further Resolved that effective with all meter readings on and after December 29, 1959 and pursuant to said Section 1 of resolution adopted by the Board of Light, Gas & Water Commissioners on December 17, 1959, all electric rate schedules in effect prior to December 29, 1959 are rescinded and the electric rate schedules identified as E-1 through E-12, hereby adopted and prescribed, shall become effective.

APPENDIX G.

Memphis AFL-CIO Labor Council et al.,	In the Chancery Court, Part One
vs.	at Memphis, Tennessee
City of Memphis et al.	No. 62170-I R. D.

Fiat.

To the Clerk and Master of the Chancery Court of Shelby County, Tennessee:

Issue the Writ of Certiorari as prayed for in the foregoing petition, and further issue an injunction as prayed for in the foregoing petition, requiring the respondent Memphis Light, Gas and Water Division to indicate on all of it's bills by a separate item all amounts billed under the increased electric rate dated effective December 29, 1959, and that any amount so collected be separated and set aside pending the further Orders of this Court.

Robert A. Hoffman,
Chancellor.

December 30, 1959.

APPENDIX H.

Memphis AFL-CIO Labor Council et al. vs Board of Commissioners of the City of Memphis et al.	In the Chancery Court, Part One, at Memphis, Tennessee No. 62170-I R. D.

Order Partially Suspending Injunction Denying Motion to Dissolve, and Denying Motion to Increase Bond.

This cause coming on to be heard upon the written motion of the respondents to dissolve the injunction for want of equity on the face of the bill and the motion of respondents on the motion docket to increase the amount of the injunction bonds, said motions being considered by the Court to be in the alternative, and both of said motions being set by consent for special hearing and being heard together, and after hearing the testimony of witnesses, affidavits submitted, brief, and arguments of counsel,

It Is Hereby Ordered Adjudged and Decreed that there is hereby suspended that part of the injunction that requires the respondent Memphis Light, Gas & Water Division to itemize the proposed increase on each individual consumer's bill, but that portion of the injunction remains in full force which requires the respondent Memphis Light, Gas & Water Division to keep separate and apart in a special fund, or funds, all monies collected as a result of the electric rate increase dated effective December 29, 1959, and the motions of respondents are in all other respects denied and dismissed, to all of which actions all of the respondents except.

Robert A. Hoffman,
Chancellor.

Entered January 8, 1960.

APPENDIX I.

Court of Appeals of Tennessee,
Western Section,
at Jackson Tennessee.

City of Memphis et al.,
vs.
Memphis A. F. L.-C. I. O. et al.
} Shelby Equity.

Order Granting Certiorari and Decree Dismissing Bill.

Filed February 26, 1960.

Lucile Myers, Clerk.

This cause was this day heard upon the petition of the City of Memphis, a municipal corporation, Memphis Light, Gas & Water Division, and the City Commissioners of the City of Memphis, by which petition they pray:

"1. That a writ of certiorari issue directed to the Chancery Court of Shelby County, Division I, directing said Court and the Clerk thereof to certify and transmit to this Court the entire record and proceedings in this cause.

2. That, in aid of the **certiorari**, a writ of **supersedeas** issue from this Court suspending the injunction issued by said Chancery Court and staying all further proceedings in said Chancery Court until further order of this Court.

3. That the order of the Chancery Court granting the writ of certiorari and injunction be declared illegal and in excess of the Court's jurisdiction and that same be vacated and dissolved and this proceeding dismissed at costs of defendants to this Petition.

4. That petitioners, and each of them, have such other and further relief as they may be entitled to in the premises."

and at which hearing they further moved the Court that the original bill of the complainants, who are respondents in this petition for certiorari, be dismissed for want of equity on the face of the bill.

Extensive briefs were filed by the respective parties, and the entire record, as filed in the Chancery Court of Shelby County, duly certified, was filed as provided by law in certiorari cases.

Extensive oral argument was had upon the petition, the response thereto, and the record as it appeared on file in this Court.

The allegations of the original bill filed with the Chancery Court of Shelby County, Tennessee, upon which the original complainants insist that they had a right to maintain this suit and that the writ of certiorari should not issue, and the motion to dismiss the original bill should not be considered, are set forth in paragraph 14 of the original bill as follows:

> "14. Petitioners would further show that said rates are unjust, unfair, unequal and discriminatory in that they are unequal and discriminate against petitioners as a class, as well as other residential consumers, applying without reason and arbitrarily a higher percentage increase to petitioners as residential consumers than the percentage increase applied to other classes of consumers; and further discriminate illegally, arbitrarily and unreasonably among residential consumers or among consumers of the same class, by providing that some residential consumers will actually receive a decrease, while other consumers will receive an increase in varying amounts, some as high as 3[illegible]

and that said rates, because of their inequality, are discriminatory on their face. In no case is the same percentage increase equally applied to all consumers in any class, nor is the same percentage increase applicable between classes, and all of said arbitrary and unequal increases constitute discrimination and confiscation of petitioners' property without due process of law."

With the record there was filed a schedule of charges for electric service, as fixed by the Memphis Light, Gas & Water Division of the City of Memphis and approved by the City Commissioners of the City of Memphis, which are under attack in the original bill filed in said Chancery Court.

A review of the entire record, as we are able to understand it, presents to this Court a case in which a writ of certiorari should be issued by this Court.

It further appears to this Court that the motion to dismiss the entire original bill, dissolve the injunction issued by the Chancellor, and set aside, by such dismissal, all orders and decrees made in this cause, has been carefully considered by this Court.

In the original bill and Section 5 of the prayer thereof, is set forth what the original complainants seek to have the said Chancery Court of Shelby County finally decree, and which Section of said bill is as follows:

"5. That this Court at the hearing review the proceedings of the respondent Board of City Commissioners and hear such other evidence as either party may desire to introduce in accordance with Tennessee Code Section 27-911 and declare that the electric rates in effect prior to December 29, 1959, shall continue in effect and order the respondent Board of City Commissioners to reverse and set aside its approval of the

increased electric rates in the schedules proposed to become effective December 29, 1959, and to order that the increased electric rates proposed by the respondent Memphis Light, Gas and Water Commissioners be suspended permanently."

It appears to this Court that such relief sought by the original complainants of the Chancery Court of Shelby County, could mean, if granted, nothing more nor less than a bestowal upon the Court the authority to fix the rates for electric power service in the City of Memphis, which authority it does not have.

It further appears to this Court that the allegations in the original bill to the effect that the "said rates are unjust, unfair, unequal and discriminatory", are but conclusions of the pleaders which are in no way substantiated by any allegations of the original bill, or by the record filed in this cause in this Court, and that there is no equity on the face of the bill, nor shown by the entire record which could bestow upon the Chancery Court of Shelby County the authority and jurisdiction sought.

It Is, Therefore, Ordered, Adjudged And Decreed by this Court:

(1) That petition for writ of certiorari be sustained, said writ granted, and the action of the Chancery Court of Shelby County, as set forth in the petition, be reviewed

(2) That no equity appearing on the face of the original bill, and more particularly that there is nothing in the entire record which would warrant this Court to conclude that the original defendants, City of Memphis, Memphis Light, Gas & Water Division, the Board of Commissioners of the Light, Gas & Water Division, and the Commissioners of the City of Memphis, have acted unjustly, unfairly, illegally, or discriminatorily in the fixing of the rates and charges for electric service, and it appearing that on the record in this cause the Chancery Court is without jurisdiction to grant the relief prayed, the motion to dismiss the original proceedings is sustained, the original bill dismissed, the injunction issued herein dissolved, the orders and decrees of the Chancery Court set aside, and that the original complainants and the sureties on their bonds taxed with the costs of this cause.

It Is All So Ordered, Adjudged and Decreed, this 26th day of February, 1960.

J. B. Avery, Sr., C. S. Carney, and L. D. Bejach, Judges of the Western Section of the Court of Appeals of Tennessee.

APPENDIX J.

Supreme Court of Tennessee.

Memphis AFL-CIO Labor Council et al.,
vs.
City of Memphis et al. } Shelby Equity.

Decree.

Entered June 6, 1960.

(No written opinion.)

This cause came on to be heard upon a petition for certiorari, and after full consideration by the Court, the Court is of opinion that there is no merit in said petition and the same is accordingly denied at the cost of petitioner, for which let execution issue.

COPY

Supreme Court of the United States

OCTOBER TERM, 1960

No. 230

MEMPHIS A.F.L.-C.I.O. LABOR COUNCIL, ET AL., *Petitioners,*

vs.

CITY OF MEMPHIS, ET AL., *Respondents*

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF CITY OF MEMPHIS AND MEMPHIS LIGHT, GAS AND WATER DIVISION IN OPPOSITION

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BRIEF OF CITY OF MEMPHIS AND MEMPHIS LIGHT, GAS AND WATER DIVISION IN OPPOSITION

QUESTION PRESENTED

Where the governing body of a city, in prescribing an increase in electric rates for its municipally-owned utility, admittedly acts pursuant to valid statutory authority and without any charge of actual fraud, and where the objectors' complaint is based solely upon the contention that the increase is unnecessary, does such a complaint raise an issue as to the violation of federal Constitutional rights?

STATUTE INVOLVED

Chapter 381, Tennessee Private Acts of 1939, sections 7, 17 and 19, which authorize and empower the City to fix and to change electric rates to be charged by the municipally-owned utility, and which require that certain minimum revenue requirements be met at all times, and which set forth the purposes for which revenues shall be expended. The applicable sections are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

This case involves an increase in electric rates averaging 18.5%, prescribed by the Board of Commissioners of the City of Memphis for its municipally owned utility, the Light, Gas and Water Division, hereinafter called "Division", effective December 29, 1959. The increase in rates was necessitated by the higher costs to be experienced in the operation of the City's new steam electric generating plant, as compared with the low-cost power purchased from the Tennessee Valley Authority prior to the expiration of the City's contract with it in 1958. The steam generating plant, which had to be built to replace the Tennessee Valley Authority as the City's source of power, was finally completed late in 1959.

In late November, 1959, the officials of the Light, Gas and Water Division announced that an increase in electric rates designed to produce an increase in revenues of approximately 20% was presently necessary. (Appendix C, pp. 13-15, Petition for Certiorari).

This decision was reached upon consideration of the recommendations of Black and Veatch, a nationally known independent consulting engineering firm which had been engaged in a study of the Division's rate structure for approximately three months. (Id.)

The Division thereupon initiated the procedures for effectuating a rate increase in accordance with Chapter 381 of the Private Acts of Tennessee of 1939. No contention is made that the procedures provided in said Act were violated in any way.

Although the Private Act does not require it, the City Commission for the first time in its history initiated a public hearing at which the Division presented testimony and exhibits; including the final report of Black and Veatch, Consulting Engineers, on its study of the Division's rate structure (Appendix F, p. 19, Petition for Certiorari; R. 557-558). The hearings began December 22nd and continued through December 23rd, and were concluded on December 29. (Id.) Testimony, statements, studies and exhibits both for and against the proposed increase were considered. (Id.)

Included in the evidence presented to the City Commission by the Board of Light, Gas and Water Commissioners were the following items:

(1) President Morton of the Division presented a rate study made by the Division indicating a deficit in revenues for 1960, at the old rates, of $6,041,902. (R. 96; Exhibit C to Application for Approval of Changes in Rates)

(2) Morton testified there was no way of curtailing expenses or increasing revenues to make up the deficit without a rate increase (R. 97); that such increase was necessary to keep the Division in sound financial condition (R. 98f; and that even with the increased rates requested, there would remain a deficit for 1960 of nearly $600,000. (R. 99, 100)

(3) Albert P. Learned, the expert witness from the firm of Black and Veatch, consulting engineers, testified that the old rates would result in a deficit of $5,914,000 for the year 1960 (R. 126); and

That the Division could not meet the requirements imposed by the City Charter (Chapter 381, Private Acts, 1939) at lower rates than those suggested by the witness, which were the rates adopted (R. 138-139, 140-141)

(4) A complete and intensive 31/2 month study of the Division's electric rates (Exhibit D to Application entitled "Report on Electric Rates, Electric Division, Memphis Light, Gas and Water Division") by a staff from Black and Veatch, consulting engineers, showed:

(a) Operating expenses would increase substantially in 1960 and thereafter as compared with 1959 and prior years (Table 7).

(b) Gross income at the old rates would be insufficient to pay operating expenses and interest on indebtedness of the Electric Division. (Table 8)

(c) Additional revenue of $5,914,000 would be required for 1960 in order to fully meet operating expenses, interest on debt, principal payments on debt, and payment to a reserve fund required by bond covenants (Table 8, Table 22).

(d) Net electric revenues for 1960 at the old rates would not be sufficient to meet the requirements of the covenants underlying the $163,245,000 Electric Division bond issue (Table 9). . .

(e) A blanket percentage increase to all classes of customers would not equitably distribute the

cost of service among classes, and the modified rate structure did accomplish this, with slight advantage to residential customers over other classes (P. 27, Table 21).

(f) With the new rates in effect during all of 1960, the Electric Division would still show a small deficit for that year, which would be balanced by a small surplus in 1961 (Table 22).

(5) The bond attorney from the firm which gave the opinion as to the validity of the Electric Division's $163,245,000 bond issue testified that the revenues for 1960, at the old rates, as shown on the Black and Veatch report, would be inadequate for the purpose of meeting the obligations of the City under the covenants of the Bond Resolution or the City Charter, (R. 149, 153) and that revenues from the new rates would comply with both legislative acts (R. 155).

(6) The National Director of the Utilities Division of Ernst and Ernst, national firm of certified public accountants, testified that the Electric Division at year end would have available funds in an amount no greater than that which would be required for working capital, for highway relocation, special construction projects and a contingency for major uninsurable casualties (R. 513-518).

Increased rates were adopted pursuant to a finding that:

> "[T]he increases proposed by the Memphis Light, Gas and Water Division are necessary in order that said Division and the City of Memphis perform their obligations under Chapter 381 of the Private Acts of 1939 and the Bond Resolution

> adopted by the Board of Commissioners of the City of Memphis on November 27, 1956, and to maintain the Division's sound financial condition." (Appendix F, p. 19, Petition for Certiorari; R. 557-558)

The petitioners, Memphis A.F.L.-C.I.O. Labor Council and its sixteen individual members, have never claimed that there was any actual fraud committed by the City or Division. The gist of petitioners' complaint, as stated in their petition herein, is that the increased revenues are unnecessary in that they will be used

> "for such novel, unauthorized and arbitrary purposes as 'to maintain sound financial condition,' pay millions into the City treasury for general municipal purposes as a 'tax equivalent,' and accumulate cash through excessive depreciation sufficient to begin construction of 'a fourth generating unit' (Appendix, pages 13-14), converting the city-owned utility into a source of substantial city revenue, contrary to statute and constitutions." (Petition for Certiorari, p. 3)

For a city to maintain itself in sound financial condition may in these days be "novel", but it is not yet unconstitutional. The remaining elements of petitioners' charges, even if true, would raise no federal constitutional issue. The governing statute, Chapter 381 of the Private Acts of 1939, expressly provides for payment of tax equivalents to the City (Section 19 (4)), for use of a reasonable surplus account "for extensions and improvements to the light plant or system" (Section 19 (5)), and for payment into the City Treasury of a return on investment not to exceed 6% (Section 19 (6)).

The fact is, however, that the increased rates will provide no margin for accumulating cash through a depreciation reserve for major additions to plant, but only for normal "renewals and replacements."[1] Furthermore, the increased rates will provide for no return on investment to the City, although the applicable statute would permit a 6% return.

The "Question Presented," as stated by petitioners, (Petition for Certiorari, p. 3), is whether courts have jurisdiction to declare rates "unconstitutional" and to prevent a city from "arbitrarily" fixing "unfair, exorbitant rates."

The Tennessee courts never reached that question, because they found no factual allegations in the pleadings, nor evidence in the record, to support the conclusion that the rates were unconstitutional, unfair, or exorbitant or that the City acted arbitrarily.

The Labor Council's bill filed in the Chancery Court of Shelby County sought a "full and independent judicial consideration of the facts and law upon which their claim of right is predicated" (R. 2) and prayed that Court to "review the proceedings of the respondent Board of City Commissioners and hear such other evidence as either party may desire to introduce," and to order the City Commission to "reverse and set aside

[1] The Report on Electric Rates by Black and Veatch states on page 35:

> "Funds in the Renewal and Replacement Fund are developed from depreciation accruals. Accruals shall be at reasonable rates of depreciation on all classes of property less the principal payments for the same fiscal year on the bonded indebtedness. It is estimated that there will be no balance in this fund as normal additions and replacements of property amount to $6,000,000 to $7,000,000 each year."

its approval of the increased electric rates" and to order that they be "suspended permanently." (Appendix I, pp. 25, 26, Petition for Certiorari).

The Tennessee Court of Appeals held:

(1) The relief sought by petitioners, invoked exercise by the Chancery Court of a power to *fix rates* for electric power service in the City of Memphis, which power that Court did not possess;

(2) The conclusion stated in the bill that the rates were "unjust, unfair, unequal and discriminatory" was not substantiated by any factual allegations; and

(3) A review of the entire record, including the transcript of the hearing before the city Commission, revealed nothing which would warrant a finding that the City or Division officials had "acted unjustly, unfairly, illegally or discriminatorily in the fixing of the rates and charges for electric service. . . ." (Appendix I, pp. 25, 26, Petition for Certiorari)

This holding was in accord with the principle that "The Courts cannot directly or indirectly exercise the rate-making power. . . ." *Hoover Motor Express* vs. *R. R. P. U. Commission*, 195 Tenn. 593, 605, 261 SW 2d 233, 238; and with the principle that the courts will not engage in "subjecting the merits of every action of statutory commissions and boards to judicial review, substituting the discretion of the Circuit or Chancery Courts for that of administrative bodies." *Anderson* vs. *City of Memphis*, 167 Tenn. 648, 72 SW 2d 1059; *Savage Co.* vs. *Knoxville*, 167 Tenn. 642, 72 SW 2d 1057; *City of Nashville* vs. *Martin*, 156 Tenn. 443, 3 SW 2d 164; *Carriger* vs. *Mayor of Morristown*, 148 Tenn. 585, 256 SW 883.

FACTUAL ERRORS IN PETITION FOR CERTIORARI

The Petition for Certiorari makes mention of several figures, lifted from the voluminous record, and claims they were "ignored" by the City Commission. (Petition for Certiorari, pp. 4, 9) The figures mentioned by petitioners were dealt with at length by the Division's accounting witness, Carl White, National Director of the Utilities Division of Ernst and Ernst, Certified Public Accountants. (R. 442-471; Exh. 1 and 2, White; R. 436, 442).

Petitioners included in their "record" the judgment *pro confesso* of February 4, 1960, but did not mention the Order of March 3, 1960 which set aside the *pro confesso* as prematurely and improvidently issued. This order was entered by the Chancery Court while the case was pending in the appellate courts, and is not included in the record.

Petitioners state the fact (dehors the record) that the City now has a contract to purchase "cheap TVA power to be resold after 1959 . . .". (Petition for Certiorari, p. 3), but fail to add that the sales will not begin until 1962, and then at rates much higher than those available to ordinary distributors on the TVA system, and for limited volumes for peak period consumption only.

Petitioners state that one "city expert estimated 1960 loss of $6 million" at the old rates, while another "city expert estimated 1960 profit of $4,262,368." (Petition for Certiorari, p. 9). They fail to explain that the first expert was a witness testifying from the current studies made in the fall of 1959, while the second reference to a "city expert" is not to be witness in this case, but to an Economic Feasibility Report prepared in 1956 prior to commencement of construction of the City's $163,245,000 generating plant, estimating what the cost of power would be from the

proposed plant, assuming a much more favorable bond interest rate than was in fact obtained, and a higher rate of growth than was in fact experienced.

The Petition alleges (p. 9) that the "City of Memphis decided to finance future construction from cash without issuing further municipal bonds. . . ." No record reference is given, and none could be found. Except for ordinary renewals and replacements for existing plant, there has been no decision to finance future construction from cash.

CONCLUSION

The Petition for Certiorari fails to show that the Labor Council or its sixteen members have been deprived of any Constitutional rights or other rights, or that any Constitutional issue is involved in these proceedings, or that the Tennessee courts have committed any error whatsoever.

WHEREFORE, Respondents respectfully submit that the Petition for Certiorari should be denied.

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APPENDIX

Amendment to the Charter of the City of Memphis

By Private Acts Tennessee, 1939.
Chapter 381, House Bill 1264
Creating Board of Light, Gas and Water Commissioners.

SECTION 7: *Be it further enacted*, That said Board of Light, Gas and Water Commissioners shall have authority to make a schedule of rates for the several services and for different classes of consumers; and shall make such rates for the service rendered as will enable them at all times to pay operating expenses, interest, sinking funds, reserves for working capital, renewals and replacements, casualties and other fixed charges; but the rates charged users or consumers outside of the City of Memphis shall not necessarily be as low as the rates within the City. The said Light, Gas and Water Commissioners shall have the right to change the schedule of rates for both light, gas and or water in the City and outside the City, from time to time, as in their judgment may be necessary or proper; provided, that before any change shall be made in rates, the Board of Light, Gas and Water Commissioners shall be required to present an application to the Board of Commissioners of the City of Memphis, setting forth the reason for said proposed changes in rates, and said changes in rates shall not become effective until they shall have been approved by said Board of Commissioners, and provided further, that the Board of Light, Gas and Water Commissioners and the Board of Commissioners of the City of Memphis, shall prescribe rates that will be sufficient to pay all bonds or other indebtedness and interest thereon, including reserves therefor, and to provide for all expenses of operation and maintenance of said plants or system, including reserves therefor.

SECTION 17. Be it further enacted, That the Board of Light, Gas and Water Commissioners shall require that separate books and accounts be kept on the electric, gas and water operations, so that said books and accounts will reflect the financial condition of each division separately to the end that each division shall be self sustaining, and may require that the moneys and securities of each Division be placed in separate accounts.

SECTION 19. *Be it further enacted*, That the revenues received each year from the operation of the Light Division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) The payment of all operating expenses of the Light Division for the year.

(2) For interest accruals and sinking fund accruals on bonds and mortgages issued for the benefit of the Light Division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualty reserves for the benefit of the Light Division, said cash payments to said reserves to be in such amounts as the Light, Gas and Water Commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the City taxes on the properties of the Light Division within the City Limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the Board of Light, Gas and Water Commissioners for extensions and improvements to the light plant or system and or for the purchase of outstanding bonds that may have been issued for the benefit of the Light Division, as the

Board of Light, Gas and Water Commissioners may deem advisable.

(6) For payment to the general funds of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the Light Division, the said percentage to be fixed by resolution of the Board of Commissioners of the City of Memphis. Should the said percentage as fixed by resolution of the Board of Commissioners of Memphis exceed a reasonable figure in the opinion of the Board of Light, Gas and Water Commissioners, the amount to be paid by the Board of Light, Gas and Water Commissioners to the Board of Commissioners of the City of Memphis shall be determined by a Board of Arbitration, consisting of one member of the Board of City Commissioners and one member of the Board of Light, Gas and Water Commissioners, who shall elect a third member, and the findings of this Board of Arbitration shall be final and binding on both the Board of City Commissioners and the Board of Light, Gas and Water Commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the Light Division during that year, unless the Board of Light, Gas and Water Commissioners shall, by resolution, consent thereto.

(7) Any surplus then remaining, over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the Board of Light, Gas and Water Commissioners in contracting with the Tennessee

Valley Authority for the purchase of power, or as may be deemed necessary by the Board of Commissioners of the City of Memphis with the approval of the Board of Light, Gas and Water Commissioners in the issuance and sale of any bonds or notes on behalf of the electric system or on behalf of the electric system in conjunction with the gas or water systems.